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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

DEC - 6 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Elehue Kawika Freemon and  
Lucille K. Freemon,

Complainants,

v.

AT&T Corp.,

Defendant.

CC Docket No. 94-89

File No. E-90-393

COMMENTS IN RESPONSE TO AT&T'S MOTION FOR SUMMARY DECISION

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December 6, 1994

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**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**

Defendant.

File No. E-90-393

**COMMENTS IN RESPONSE TO AT&T'S TO MOTION FOR SUMMARY DECISION**

The Chief, Common Carrier Bureau (Bureau), through her undersigned counsel, hereby submits these comments on the "Motion for Summary Decision" (Motion) filed by AT&T Corp. (AT&T) on November 22, 1994.

The Commission's rules provide that a party filing a motion for summary decision "may not rest upon mere allegations or denials but must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine

issue of material fact for determination at the hearing." 47 C.F.R. § 1.251(a). Precedent requires that a summary decision only be granted "where the truth is clear, where the basic facts are undisputed, and the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts."<sup>1</sup>

The burden is on the moving party, here AT&T, to show that there is no genuine issue of material fact. A genuine issue of material fact exists when the question is one of disputed fact or involves the characterization of admitted facts.<sup>2</sup> When it adopted Section 1.251, the Commission made clear that the presiding officer has broad authority to go forward with a hearing, regardless of the showing made, if the nature of the proceeding and of circumstances surrounding the request persuade him that a hearing is desirable.<sup>3</sup> The Commission further stated that "the moving party's papers should be carefully scrutinized [by the presiding officer], while the opposing party's papers, if any, should be treated with considerable indulgence."<sup>4</sup>

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1 Big Country Radio, 50 FCC 2d 967, 968 (1975). See also David Lee Communications, Inc., 9 FCC Rcd 1656, 1657 (1994).

2 Telecorpus, Inc. 30 R.R.2d 1641, 1644 (1974).

3 Summary Decision Procedures, 34 FCC 2d 485, 487 (1972) The Commission stressed the point therein that, rather than being obligated by a particular showing, the new provision stated that the presiding officer "may grant" the motion. Id. at 487 (emphasis added).

4 Summary Decision Procedures, 34 FCC 2d at 488 (emphasis added). See also Big Country Radio, Inc., 50 FCC 2d at 968.

During the evidentiary hearing session held in this matter on November 28, 1994, it became readily apparent that complainant Elehue Freemon does not intend to present a great deal of corroborating evidence to support the factual assertions in his complaint. Nevertheless, he intends to appear before the Presiding Officer and present his version of the facts, which are clearly at odds with that presented by AT&T. AT&T's assertions regarding the record notwithstanding, the Bureau submits that insufficient grounds have been presented for granting AT&T's Motion for Summary Judgment and urges the Presiding Judge to deny the Motion.

I. Disputed Factual Issues Exist Regarding the Alleged  
Section 705 Violation

AT&T argues that Section 705 of the Act prohibits the unauthorized interception and disclosure of certain interstate and foreign communications, and that the statute is violated only if such a communication has both been unlawfully intercepted and divulged. AT&T asserts that because complainants have offered no admissible evidence that either of these requirements has been met, there is no genuine factual issues to be resolved by the Presiding Judge.

AT&T's characterization of the legal basis and facts underlying the Freemons' claims is less than forthright. The crux of the Freemons' complaint, as set forth in the Hearing Designation

Order, is the allegation that the AT&T Operator who handled Elehue Freemon's call on May 30, 1988, improperly interrupted and divulged the contents of his call and thus violated Section 705 of the Act.<sup>5</sup> Independent of its prohibition on unlawful interception and disclosure, Section 705(a) of the Act also prohibits a telephone company employee, such as the AT&T operator in the instant case, from disclosing to unauthorized persons the contents of the calls they handle.<sup>6</sup> While the Bureau would agree that Elehue Freemon proffered surprisingly little evidentiary support for the allegations set forth in his complaint at the recent evidentiary admission session, a factual dispute nevertheless exists regarding the AT&T's operator's actions in handling his May 30, 1988 call. Elehue Freemon intends to appear at the scheduled December 12 hearing to present his version of the facts surrounding the May 30,

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<sup>5</sup> Hearing Designation Order, 9 FCC Rcd at 4033.

<sup>6</sup> Section 705(a) states, in pertinent part:  
Except as authorized by chapter 119, title 18, United States Code, [footnote omitted] no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. 47 U.S.C. § 605(a).

1988 call. The Bureau submits that his dispute with AT&T over such facts is better resolved, as it should be, with the benefit of the scheduled hearing.

II. The Complainants Have Stated a Claim Under Section 705

AT&T' assertion that the facts alleged by complainants fail to state a claim under Section 705 of the Communications Act is misplaced. As AT&T observes, Section 705 provides the basis for the Commission's subject matter jurisdiction in this proceeding. In fact, the fourth issue designated by the Commission for hearing is whether, in light of the evidence adduced under the first three issues, AT&T's actions in handling the complainants' operator-assisted call violated Section 705.<sup>7</sup> AT&T's argument that the prohibition against interception found in Section 705 of the Communications Act applies solely to radio communications is inapposite. Moreover, the assertion that Section 705 does not apply to wireline telephone calls is simply wrong.

When it amended Section 705 in 1968, Congress was very clear that the amended statute was "designed to regulate the conduct of communications personnel."<sup>8</sup> The first sentence of the

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<sup>7</sup> Hearing Designation Order, 9 FCC Rcd at 4034. AT&T appears to rely solely on the wording of the third issue and is curiously silent on the fourth.

<sup>8</sup> S. Rep. No. 1097, 90th Cong., 2d Sess. 107, reprinted at 1968 U.S. Code Cong. & Admin. News 2112, 2197.

redrafted Section 705 prohibits persons "receiving, assisting in receiving, transmitting, assisting in transmitting, any interstate or foreign communications by wire or radio . . . [from] divulg[ing] or publish[ing] the existence, contents, substance, purport, effect, or meaning thereof" to certain persons specified in the statute who are unauthorized to receive such information.<sup>9</sup> Operators working for AT&T obviously fall within the category of "communications personnel" that Congress intended to be covered by the amended statute. In the instant proceeding, no one disputes the fact that AT&T's operator assisted Mr. Freemon in placing his call.

Finally, in a footnote, AT&T reiterates a jurisdictional argument that the Commission has previously addressed and rejected. AT&T states that Section 705(e)(3)(A) provides that civil actions under this section "shall" be brought in a U.S. District court or other court of competent jurisdiction.<sup>10</sup> AT&T curiously omits the actual language of this subsection which explicitly states that civil actions "may" be brought in an appropriate court.<sup>11</sup> The statute does not use the word "shall" as AT&T would have us believe.<sup>12</sup>

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<sup>9</sup> 47 U.S.C. § 605 (a) (emphasis added). AT&T's claims, which apparently are based on the second sentence of Section 705(a), are irrelevant.

<sup>10</sup> Motion for Summary Decision at 13 n. 21.

<sup>11</sup> 47 U.S.C. § 605(e)(3)(A).

<sup>12</sup> See Hearing Designation Order, 9 FCC Rcd at 4033, para. 8.

Simply stated, the Freemons allege that AT&T's operator, in assisting Elehue Freemon place his call to Lucille Freemon, divulged the contents of his telephone conversation with Lucille Freemon to a third party without his authorization. Such action, if proven by the complainants, could be a violation of Section 705(a) of the Act.<sup>13</sup> Thus, the complainants have clearly stated a claim under Section 705.

III. The Presiding Judge's Consideration of the Issues Specified by the Commission in its Hearing Designation Order is Not Time-Barred by Section 415(b) of the Communications Act.

It is well established that a threshold requirement for pursuing a claim for damages against a common carrier under the Communications Act is that the claim be presented to the commission within two years from the time the cause of action accrues.<sup>14</sup> The general rule is that the point when a cause of action accrues is when the carrier performs the alleged unlawful act.<sup>15</sup> As AT&T seems to acknowledge in its Motion, the statute is not discretionary and the lapse of time beyond the limitations period not only bars the remedy but also destroys the liability.<sup>16</sup>

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<sup>13</sup> Id., at 2-3, para. 10.

<sup>14</sup> See Tele-Valuation, Inc. v. AT&T, 73 FCC 2d 450 (1979).

<sup>15</sup> Id., citing Armstrong Utilities, Inc. v. General Telephone Co. of Pennsylvania (Armstrong), 25 FCC 2d 385, 390 (1970).

<sup>16</sup> See Armstrong, 25 FCC 2d at 390.



The Bureau submits that the question whether Section 415(b) of the Act bars consideration of the Freemons' complaint is not properly before the Presiding Judge and, thus, cannot be raised by AT&T as a basis for summary decision in this matter. The Commission's Hearing Designation Order designates the Freemons' complaint for evidentiary hearing to resolve material questions of fact surrounding AT&T's handling of an operator-assisted telephone call involving Elehue K. Freemon and Lucille K. Freemon on May 30, 1988.<sup>17</sup> The Commission did not specify a statute of limitations issue, nor did it otherwise call into question the jurisdiction of the Commission, or the Presiding Judge, to give full consideration to the issues raised by the complaint, as set forth in the Hearing Designation Order.<sup>18</sup> Under these circumstances, it is clear that the Hearing Designation Order effectively disposed of any claim that Section 415(b) bars consideration of the Freemons' complaint.<sup>19</sup>

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<sup>17</sup> It is undisputed that May 30, 1988 is the date the Freemons' cause of action accrued for purposes of Section 415(b).

<sup>18</sup> The Bureau notes that AT&T raised Section 415(b) as a substantive and procedural bar to the Freemon's complaint in the pre-designation proceedings on the Freemons complaint. See letter from Peter H. Jacobi to Thomas D. Wyatt (Aug. 12, 1993).

<sup>19</sup> Indeed, AT&T's arguments in this regard constitute nothing more than belated attacks on the Hearing Designation Order. If the Hearing Designation Order had left unresolved questions of timeliness under Section 415(b) of the Act, AT&T at the time the Hearing Designation Order was issued could have filed an application for review as provided in Section 5(d)(4) of the Communication Act and Section 1.115 of the Commission's rules.


CONCLUSION

As discussed above, AT&T has failed to demonstrate that there is no factual issues in dispute, that the complainants have failed to state a claim under Section 705, or that the complainants' action is time-barred. Under these circumstances, there is insufficient basis for a grant of AT&T's Motion for Summary Decision.

Respectfully submitted,

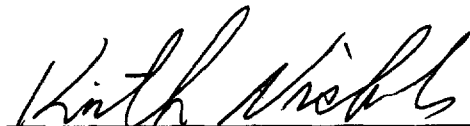
Kathleen M. H. Wallman  
Chief, Common Carrier Bureau

By



*for* Thomas D. Wyatt

Chief, Formal Complaints  
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Keith Nichols  
Trial Attorney

December 6, 1994

CERTIFICATE OF SERVICE

I, Keith Nichols, do hereby certify on this, the 6th day of December 1994,  
I have served copies of the foregoing "COMMENTS IN RESPONSE TO AT&T'S MOTION FOR  
SUMMARY DECISION" by first-class, U.S. Mail, on the following:

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December 6, 1994  
Date

  
\_\_\_\_\_  
Keith Nichols